

Article 9 and Security Interests In Instruments, Documents of Title and Goods

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INTRODUCTION AND DEFINITIONS

A previous paper has compared the provisions of Article 9 of the Uniform Commercial Code (hereinafter called the "Code") with existing Ohio law relating to security interests in accounts, contract rights, and chattel paper.¹ This paper continues the comparison with respect to (a) the remaining two subclassifications of intangible personal property (i.e., "documents of title" and "instruments") and (b) tangible personal property (called "goods" by the Code and subclassified into "inventory," "equipment," "consumer goods" and "farm products"). The reader is referred to the previous paper for an introduction to Article 9 and a discussion of its major policies; this paper will be concerned with detail rather than with perspective.

The Code in § 1-201 (15) defines "document of title" as including a "bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the current course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass." This is substantially the same definition used in the Uniform Sales Act and in OHIO REV. CODE § 1315-01 (F), but it has been rephrased so as to include new types of documents which may develop, such as those which in air transport may eventually supersede the bill of lading.

"Instruments" are defined in the Code § 9-105 (1) (g) as "a negotiable instrument (defined in § 3-104), or a security (defined in § 8-102) or any other writing not itself a security agreement or lease which evidences a right to the payment of money and is of a type which is in ordinary course of business transferred by delivery." The Code excludes from its definition of an instrument the group of papers arising from a transaction if they include not only a negotiable note but also a chattel mortgage or conditional sales

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¹ Freedheim and Goldston, *Article 9 and Security Interests in Accounts, Contract Rights, and Chattel Paper*, 14 OHIO ST. L. J. 69 (1953).

agreement. That Ohio law seems to be moving toward this same conclusion has already been noted in the earlier paper on Article 9.² A recent illustrative case is *Conner v. Light & Furniture Co.*,³ where on procedural grounds a municipal court judgment was affirmed which rescinded a sale and refused judgment on a note although the note and mortgage had been negotiated to a finance company.⁴

"Goods," as defined in Article 9, has substantially the same meaning as "chattels personal" would have to an Ohio lawyer. The test is movability at the time the security interest attaches. The definition expressly includes unborn young of animals, growing crops and presently movable things even though they are later affixed to realty.⁵ The definition expressly excludes money, documents of title, instruments, accounts, chattel paper, contract rights and other things in action. Although this concept of goods fits rather easily into an Ohio lawyer's outline of property, the subclassifications of the concept used by Article 9 are new. Because important differences in legal consequence result from how a particular item of goods is subclassified, these new subclassifications as stated by Code § 9-109 will be quoted in full:

"Goods are

(1) 'consumer goods' if they are used or bought for use primarily for personal, family or household purposes;

(2) 'equipment' if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a non-profit organization or a governmental subdivision or agency or if the goods are not included in the definition of inventory, farm products or consumer goods;

(3) 'farm products' if they are crops or livestock used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool-clip, maple syrup, milk and eggs), and if they are in the possession of a debtor from whose raising, fattening, grazing or other farming operations they derive or in which they are used. If goods are farm products they are neither equipment nor inventory;

(4) 'inventory' if they are held or are being prepared for sale or are to be furnished under a contract of service or if they are raw materials, work in process or materials used or consumed in a business. If goods are inventory they are neither farm products nor equipment."

Ohio statutes and case law, as the next section of this paper

² 14 OHIO ST. L. J. at 89 (1953).

³ 94 Ohio App. 385 (1953).

⁴ See Amodio and Howard, *Finance Company as a Holder in Due Course*, 28 NOTRE DAME LAW 251 (1953); Note—*Finance Company as Holder in Due Course*, 20 U. OF CIN. L. REV. 123 (1951).

⁵ U.C.C. § 9-105(1) (f).

will illustrate, do presently recognize some distinctions in legal consequence dependent upon the nature and use of the goods. For example, household goods require special treatment under the chattel mortgage statute and only imports or readily marketable staples can be financed by trust receipts. There is no systematic subclassification, however, and formal differences in legal documents are usually more significant than differences in the use or in the physical nature of the goods.

*SECURITY INTERESTS IN DOCUMENTS OF TITLE,
INSTRUMENTS AND GOODS UNDER EXISTING OHIO LAW*

Ohio lawyers at present have at least ten common law and statutory devices for creating chattel liens for commercial security reasons. Pledge, consignment, bailment lease and field warehouse are based on common law principles. Chattel mortgage, conditional sale, factor's lien, trust receipt, crop mortgage and railroad equipment mortgage are expressly covered by Ohio statutes. Some of these devices overlap so that in some transactions the draftsman has his choice of forms; and some transactions which are possible in other states can be brought within none of the Ohio devices. Each has its special formalities and its different procedures and legal consequences, but none has a comprehensive set of rules covering such contemporary problems of chattel security as future advances, after-acquired property and attachment to real estate. Therefore the Ohio draftsman will be troubled by problems not covered by statute or case law for the particular device he has selected unless the transaction is an extremely simple one. In attacking a security arrangement, the claim is usually made that the wrong device was used or that some minor detail of the formal procedure was omitted. A brief review of these various devices will provide a background against which to contrast the innovations proposed by Article 9.

(1) *Pledge*. Except for the requirements of the Small Loan Act⁶ and pawnbroker regulations,⁷ Ohio retains the common law of possessory pledges, and this is the normal method of obtaining a security interest in documents of title, instruments and smaller valuable tangible chattels.

(2) *Field Warehouse*. The field warehouse is a variation of the possessory pledge.⁸ It introduces a fictional warehouseman in order to make use of the warehouse receipt pledge provisions of

⁶ OHIO REV. CODE § 1321.01 *et seq.*

⁷ OHIO REV. CODE § 4727.01 *et seq.*

⁸ See Note, 19 Ohio Op. 220 (1941); FRIEDMAN, FIELD WAREHOUSING, 42 COL. L. REV. 991 (1942); JACOBY AND SAULNIER, FINANCING INVENTORY ON FIELD WAREHOUSE RECEIPTS (1944).

the Warehouse Receipts Act.⁹ The field warehouse company for a nominal rental leases space from the borrower on the borrower's premises and usually hires the borrower's warehousing foremen to act as the field warehouseman's agent.¹⁰ The borrower then turns over possession of the property in the leased space to the field warehouseman's agent. The field warehouse company, being in possession of the goods, now issues for them a warehouse receipt which can be used as collateral for a loan. This device permits a lender to maintain a lien on a constantly changing inventory by releasing goods only against payment and lending to pay for goods as deposited in the field warehouse.

(3) *Bailment Lease*. The chattel lease with option to buy is substituted for the chattel mortgage or conditional sale for various reasons. Perhaps the most frequent reason is that the lessee hopes to deduct his payments as rent in calculating his income tax rather than to show a purchase of a capital asset with subsequent depreciation of the cost. The lessee may also hope to avoid personal property tax by not taking title or may hope to avoid showing a liability on his balance sheet for the unpaid portion of the purchase price. Bailment leases are often attacked as disguised conditional sales which should have been recorded. The Code reduces but will not entirely eliminate the uncertainty. At Code § 9-102 (2) it is applied to "a lease intended as security."

OHIO REV. CODE § 1335.03 must also be considered in connection with bailment leases. This statute provides that when "goods and chattels remain for five years in the possession of a person . . . to whom a pretended loan thereof has been made, such goods and chattels become the property of such person, unless . . ." a document is filed reserving title. This statute has been construed by the Ohio Supreme Court so as to permit a bailee to retain dies held by him for more than five years after having been originally provided in connection with a contract to supply work done with the dies.¹¹ The situation in the case the Ohio Supreme Court decided was sufficiently like a bailment for hire that some bailment lessee or bailee for hire may well try to use OHIO REV. CODE § 1335.03 as a defense.¹²

(4) *Consignment*. "Memo billing," whereby a retailer is sup-

⁹ OHIO REV. CODE § 1323.01 *et seq.*

¹⁰ A sublease to a field warehouseman does not violate a covenant against subleasing. *Mercury Electronic Laboratories v. Krug*, 330 Ill. App. 336, 71 N.E. 2d 104 (1947). A field warehouse employee is not in interstate commerce although stationed at a company engaged in interstate commerce. *Walling v. Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (1944).

¹¹ *Richter & Phillips Co. v. Queen City Mfg.*, 156 Ohio St. 143 (1951).

¹² See Note, *Fraudulent Conveyances—Loans of Chattels—Recording of Loans*, 21 U. OF CINN. LAW REV. 308 (1952).

plied with an inventory by a wholesaler and, in theory at least, purchases from the wholesaler as he makes each retail sale, is frequently used in Ohio. If all relevant papers are carefully drafted and if the parties meticulously observe the consignor-consignee relationship, the title of the consignor will be upheld. The difficulty lies in the fact that the parties frequently transform the relationship into a debtor-creditor one by their book entries, invoices and treatment of proceeds. Ohio authority is scanty but one case does hold that a bailment rather than a conditional sale is created by a carefully drawn consignment contract, at least when there is no issue raised as to whether the parties in practice observed the provisions of the contract.¹³ The consignee is not liable for Ohio personal property tax on consigned merchandise.¹⁴

(5) *Chattel Mortgage*. OHIO REV. CODE §§ 1319.01 to 1319.10, inclusive, covers chattel mortgages. A chattel mortgage must be filed "forthwith" after delivery of possession to the mortgagor. The filing is made with the county recorder of the county where the mortgagor resides at the time of the execution of the mortgage. If the mortgagor resides outside Ohio, the filing is made with the recorder of the county in which the mortgaged property is located. Mortgages upon both real and personal property may be indexed as chattel mortgages but recorded and indexed as real estate mortgages also. There are two principal formalities required—the mortgagee's sworn statement and the joint consent of husband and wife to the mortgaging of household goods. If the mortgage is to secure a money debt, the mortgagee must under oath state "the amount of the claim and that it is just and unpaid." If the mortgage is to indemnify a surety against liability, the sworn statement must state "the liability and that the instrument was taken in good faith to indemnify against loss that may result therefrom." Except when the chattel mortgage is given to secure the original purchase price, an effective lien cannot be created upon "personal household property" of a married person unless both the husband and wife execute the mortgage.

There are several restrictions on a mortgagee's rights in the event of default. Repossession prior to foreclosure of the chattel mortgage in a court of record will eliminate any right to a deficiency judgment unless a 10-day notice is given the mortgagor of the time and place of sale, the minimum price which will be accepted, and a notice that the mortgagor will be held liable for any deficiency.¹⁵ "Necessary household goods, wearing apparel, or

¹³ See, *R. Carillo & Co. v. McAfee Bros. Furn. Co.*, 42 Ohio App. 259 (1932).

¹⁴ OHIO DEPARTMENT OF TAXATION, Rule 208 (1941).

¹⁵ See *Restrictions on Deficiency Judgment where Chattel Mortgagee Repossesses Property Without Order of Court*, 10 OHIO ST. L. J. 470 (1949).

mechanic's tools of a person or family" cannot be seized prior to foreclosure and the mortgagee will have the court costs adjudged against him unless he recovers the full amount of his petition. These restrictions, however, do not apply "to the sale of furniture or other household goods by regular dealers."¹⁶

A recorded chattel mortgage on a stock of merchandise is valid against lien creditors if the mortgagor sells the inventory as a bona fide agent of the mortgagee and accounts to the mortgagee for the proceeds of the sale. If the mortgagor retains the power of sale for his own benefit and need not account to the mortgagee for the proceeds of sale, however, the mortgage is good between the parties but void as to lien creditors. The legal theory is that a chattel mortgage granted only with the reservation that the mortgagor may sell the collateral for his own benefit is fraudulent.¹⁷ The mortgagee of such a fraudulent mortgage can, however, perfect his interest against lien creditors by taking possession of the collateral either with the consent of the mortgagor at such time or under an authorization contained in the mortgage.¹⁸ A chattel mortgage is not valid as to after-acquired property or replacement merchandise until the mortgagee obtains possession of the collateral.

(6) *Conditional Sales.* OHIO REV. CODE §§ 1319.11 to 1319.16, inclusive, covers conditional sales. (The trust receipt provisions are also included in § 1319.11.) The draftsmen of OHIO REV. CODE § 1319.11 attempted to cover all forms of conditional sales including ones disguised as leases, and the courts have generally applied the statute to such disguised sales.¹⁹ The formal requirements of a conditional sales agreement good against creditors are a written agreement executed by the purchaser, a statement thereon under oath by the seller of the amount of the claim, and the recording of the original or of a copy with an affidavit that it is a true copy. The recording is with the recorder of the county where the buyer resides or if he resides outside of Ohio, of the county where the property is situated. Conditional sales are little used in part because finance companies and banks prefer to finance on chattel mortgages so that they need not in theory become condi-

¹⁶ See Karlinger, *Chattel Mortgages as Security*, 23 OHIO BAR 353 (1950); Meredith, *Installment Sales Under The Metzenbaum Act*, 23 OHIO BAR 357 (1950).

¹⁷ See Note—*Rights Under The Ohio Law of a Mortgagee of a Chattel Who Has Allowed The Mortgagor to Remain in Possession of the Mortgaged Property With a Power of Sale*, 7 U. OF CIN. L. REV. 315 (1933).

¹⁸ *Francisco v. Ryan*, 54 Ohio St. 307 (1896).

¹⁹ *Unitype Co. v. Long*, 143 Fed. 315 (1906); *In re Printing Co. Bankrupt*, 3 OHIO L. REP. 137 (1905).

tional sellers.²⁰ A more important reason for preferring chattel mortgages is the refund-prior-to-repossession provision of OHIO REV. CODE § 1319.14. That section prohibits repossession unless the seller tenders to the buyer a refund of the money paid minus "a reasonable compensation for the use of such property, which in no case shall exceed 50% of the amount paid." No refund is required if it would be less than 25% of the purchase price. These refund provisions do not apply to machinery and equipment for railroads, contracting, quarrying, mining and brick, cement and tile manufacturing. They also do not apply, since 1951, to property having a contract price of \$5,000.00 or more. Since this 1951 amendment, conditional sale financing of heavy equipment has been more frequently used.

(7) *Factor's Lien*. Under the common law, the merchant factor's lien is asserted by a sales agent against property of his principal in the sales agent's possession. It is a possessory lien limited to amounts due to the sales agent for advances, commissions and expenses due him from the principal. Although this common law lien has been preserved in Ohio,²¹ changing business methods have made it unimportant and it has only a remote historical relationship to the statutory factor's lien.²²

The first step in the creation of a statutory factor's lien under OHIO REV. CODE § 1311.59 *et seq.* is the execution by the borrower and the factor of a written agreement which provides that the factor is to have a lien upon merchandise owned by the borrower. The agreement neither need specifically describe the merchandise covered nor is it necessary that such merchandise be in existence at the time the agreement is made. The agreement should provide that the merchandise which will be covered by the lien shall from time to time be identified in separate written statements dated and executed by the borrower and delivered to the factor. These written statements in practice usually are copies of the invoices, inventory cards or other operating documents. Within fifteen days after the execution of this written agreement a public notice of the agreement signed by both parties to it must be filed in the county in which the borrower's principal place of business is located.

The factor's lien is deemed to have been perfected and is valid, as of the date of duly filing the said notice, against unsecured creditors of the borrower and against unsecured liens of creditors. The lien as to each of the various items of merchandise exists when the separate written statement covering that item is delivered to

²⁰ See Karlinger, *Chattel Mortgages as Security*, 23 OHIO BAR 353, 354 (1950).

²¹ OHIO REV. CODE § 1311.64.

²² See Cameron, *Factors' Liens in Ohio*, 23 OHIO BAR 361 (1950).

the factor. The general exception to the foregoing is that specific liens arising out of contractual acts of the borrower with reference to the processing, warehousing, shipping or otherwise dealing with the merchandise in the usual course of the borrower's business preparatory to its sale, are superior to the lien of the factor on the merchandise. Thus, a factor might have a lien on cotton fabric which, once placed in the hands of a dyer by the borrower, would be subject to a superior possessory lien of the dyer for work done. The statute also provides that merchandise subject to a factor's lien may be sold in the ordinary course of the borrower's business free from the factor's lien, whether or not the purchaser has knowledge of the existence of such lien.

The Ohio Factor's Lien Act has been substantially clarified in the process of code revision, but it is still not an entirely satisfactory inventory financing device.²³ There are many procedural questions which trouble the draftsman. Does OHIO REV. CODE § 1311.63 permit only a first extension of the term of the notice, or may it be repeatedly extended? Must a new written statement be delivered to the financier after goods have been processed, or will a statement covering steel tubing suffice for assembled bicycles? How can the lien be preserved against the accounts receivable which arise from the sale of the inventory? How much description is required in the written statements? Despite these questions, the statutory factor's lien is the most satisfactory inventory financing device available in Ohio.²⁴

(8) *Trust Receipt*. There is no substantial amount of trust receipt financing in Ohio because of the unsatisfactory state of the Ohio law on this subject. The statute is cryptic, and the decisions have severely restricted its application. Indeed, the Ohio law of trust receipts is incomprehensible until its history is reviewed.

Trust receipts were developed to finance importations. In simplest form, a local dealer or manufacturer wants to buy goods on credit from a foreign seller. The local bank pays the foreign seller, and the seller conveys a security title to the bank and ships the physical goods to the local dealer or manufacturer. Before the local dealer or manufacturer obtains possession of the goods he executes a trust receipt to the bank. Although this was by then a well established financing device for both foreign and domestic transactions, in 1918 a trust receipt transaction was construed to be a conditional sale and held invalid for failure to record under the Ohio Conditional Sales Act.²⁵

²³ See O'line, *The Factors' Lien Act as a Method of Inventory Financing*, 4 WEST. RES. LAW REV. 336 (1953).

²⁴ See Cameron, *supra*, note 22, at p. 363.

²⁵ In re Bettman-Johnson Co., 250 Fed. 657 (6th Cir. 1918).

To overrule the 1918 case, the Ohio statute on conditional sales was amended in 1925. It provides that it should not "apply to, or ... require the deposit, filing or other record of trust receipts ... for: (A) Any goods or merchandise imported from without the United States ... (B) A readily marketable staple wherever purchased ..."²⁶ The statute does require, however, that the parties record a general agreement between them as to trust receipt financing. This last provision is generally regarded as the first use of notice filing (*i.e.*, public recordation of a general statement that some assets of a particular creditor may be subject to lien rather than public recordation of the particular lien applicable to each particular asset). Carried into the Uniform Trust Receipts Act, notice filing has been adopted in many states and has been copied from the Uniform Trust Receipts Act as one of the important concepts of Article 9.

In Ohio, however, the statute has never been well understood by the courts. In *Central Acceptance Corp. v. Lynch*,²⁷ automobiles were held not to be "readily marketable staples" and hence not appropriate objects for trust receipt financing. Prior to the Certificate of Title law of 1938,²⁸ which provides for financing dealer stocks, the automobile industry adjusted to the *Central Acceptance* case by recording trust receipts as conditional sales.²⁹ Even if the Code is not adopted, Ohio might well consider adopting the Uniform Trust Receipts Act.³⁰

(9) *Crop Mortgage*. By special statute,³¹ Ohio farmers can make a valid mortgage on crops (including fruits, nuts, berries, flowers, etc.) "either planted or to be planted within one year from the date of the execution of such mortgage or any extension thereof." The mortgage must secure a loan for crop production purposes and the loan must be obtained from various Federally approved agencies under the Farm Credits Act of 1933.

(10) *Railroad Equipment Mortgage*. OHIO REV. CODE § 1701.-82 solves two difficult problems in the financing of railroad rolling stock—the problem of the transitory nature of the collateral and the problem that replacement cars are often substituted for the original collateral. It provides an optional filing in the office of the Secretary of State which "shall have the same effect, as to the lien created thereby on such rolling stock, movable equipment or

²⁶ OHIO REV. CODE § 1319.11.

²⁷ 58 F. 2d 915 (6th Cir. 1932).

²⁸ OHIO REV. CODE § 4505.01 *et seq.*

²⁹ *In re Collingwood Motor Sales*, 72 F. 2d 137 (6th Cir. 1934).

³⁰ See *Recent Decision, Sales—Trust Receipts—Bankruptcy*, 9 OHIO ST. L. J. 708-10 (1948). Also see Hanna, *Trust Receipts*, 19 CALIF. L. REV. 257 (1931) and 168 A.L.R. 359 (1947).

³¹ OHIO REV. CODE §§ 1319.09 and .10.

machines, as though filed in the office of the recorder of each county in which such rolling stock, movable equipment, or machines are situated or employed." The statute also makes express provision for the creation of a lien upon after-acquired property.

TRANSACTIONS COVERED BY THE CODE

There are certain security transactions involving documents of title, instruments and goods which are specifically excluded from the application of Article 9. For example, security interests in vessels to the extent subject to the Ship Mortgage Act of 1920³² are excluded, as are other security interests which are subject to a "statute of the United States to the extent that such statute regulates the rights of parties to and third parties affected by transactions in particular types of property."³³ Airplanes illustrate a rather unusual provision of the Code. The Civil Aeronautics Act³⁴ provides a national registration system for liens on aircraft but does not regulate the rights of parties. Code § 9-104(a), therefore, does not exclude aircraft from Article 9, but Code § 9-302(2) does permit the Federal aircraft lien filing to serve as a substitute for Article 9 filing.³⁵

"A landlord's lien" is also excluded from the application of Article 9.³⁶ The intention here is to exclude the statutory lien in the nature of distraint which some states (but not Ohio) give to the landlord on the personal property of his tenant. The contractual lien sometimes used in Ohio leases should not be regarded as excluded from Article 9.³⁷ Equipment trusts covering railway rolling stock are excluded,³⁸ but equipment trusts on other property (e.g. contractor's equipment) are covered as are security interests in railway rolling stock other than by way of equipment trusts. Assignments or other transfers of interests or claims in or under insurance policies are also excluded.³⁹

The various statutory and common law service and material liens are expressly excluded from Article 9,⁴⁰ and the Code provides that such liens shall take priority over the Article 9 security interest "unless the lien is statutory and the statute expressly pro-

³² 46 U.S.C. § 911 ff.

³³ U.C.C. § 9-104(a).

³⁴ 49 U.S.C. § 523.

³⁵ Compare 1943 O.A.G. No. 6061 stating that a chattel mortgage on an airplane should be filed with the county recorder.

³⁶ U.C.C. § 9-104(b).

³⁷ Compare *Smith v. Waman*, 19 Ohio St. 145 (1870), holding that a lease must be filed as a chattel mortgage to give landlord a lien on tenant's chattels valid as against lien creditors.

³⁸ U.C.C. § 9-104(e).

³⁹ U.C.C. § 9-104(g).

⁴⁰ U.C.C. § 9-104(c).

vides otherwise."⁴¹ Ohio statutory chattel liens include a lien for the care of animals;⁴² an unpaid seller's lien;⁴³ warehousemen's lien;⁴⁴ common carrier's lien;⁴⁵ coal miner's lien;⁴⁶ a lien upon the get of stallions and bulls for service in breeding;⁴⁷ and a watercraft lien.⁴⁸ In *Good v. Meyer and Mendoza*,⁴⁹ it was implied that a chattel mortgagee's lien could prevail over a warehousemen's lien, and the general Ohio rule is that a chattel mortgage duly recorded takes priority over the lien of a mechanic for services subsequently performed in the repair of the chattel.⁵⁰ OHIO REV. CODE § 1311.52 perhaps reverses the *Good* case rule as to warehousemen's liens, and in *Provost v. Wilcox*,⁵¹ the lien of creditors who had outfitted a vessel was held superior to a ship mortgage in order that the mortgagee not be unjustly enriched at the cost of those who had enhanced the value of the property. The writers prefer the rule Ohio uses for watercraft and the policy of the Code of favoring liens arising from work intended to enhance or preserve the value of the collateral even over an earlier security interest which has been perfected, but the present Ohio rule as to chattel repair liens can easily be preserved by statutory provision.

Consignments are brought under Article 9 by a provision of the Sales Article which provides:

"Where the buyer has a place of business at which he deals in goods of the kind involved, such words as 'on consignment' or 'on memorandum' or other words purporting to reserve title to the seller until payment or resale are insufficient as against the buyer's creditors to keep the transaction from being a sale or return unless the seller complies with any applicable law requiring a consignor's interest or the like to be evidenced by a sign or establishes that the buyer is known to be primarily engaged in selling the goods of others or complies with the filing provisions of the Article on Secured Transactions (Article 9)."⁵²

Ohio does not have a selling factor's act with a sign provision as

⁴¹ U.C.C. § 9-310.

⁴² OHIO REV. CODE §§ 1311.48 and .49.

⁴³ OHIO REV. CODE §§ 1315.55 to .57.

⁴⁴ OHIO REV. CODE §§ 1323.27 to .36.

⁴⁵ OHIO REV. CODE §§ 4965.23 and .24.

⁴⁶ OHIO REV. CODE § 1311.25.

⁴⁷ OHIO REV. CODE §§ 1311.50 and .51.

⁴⁸ OHIO REV. CODE § 4585.01 *et seq.*

⁴⁹ 22 Ohio N.P. (N.S.) 353, 31 Ohio Dec. 305 (*affirmed* by court of appeals); *motion to certify record overruled*, 18 Ohio L. Rep. 45, 65 Bull. 217 (1920).

⁵⁰ *Securities Co. v. Orlow*, 107 Ohio St. 583 (1923); *Cleve. Auto Top & Trim Co. v. Am. Finance Co.*, 124 Ohio St. 169 (1931); *Bank v. Kerland*, 31 Ohio N.P. (N.S.) 385 (1934).

⁵¹ 17 Ohio 359 (1849).

⁵² U.C.C. § 2-326(2).

do many other states.⁵³ Under the Code, therefore, all consignments except to such establishments as auction centers would be under Article 9. This would be preferable to the present uncertain status of the consignment in Ohio.

The conflict of laws provisions of the Code are well thought out for the current commercial situation. Collateral has become easily transportable across state lines and security transactions often involve parties in several states. Ohio presently forbids the removal of personal property with intent to defraud from the county where it was situated at the time it was mortgaged, but this type of criminal statute is wholly inadequate for the commercial needs of today.⁵⁴

The Code begins with the rule that Article 9 applies to goods, documents of title and instruments if such collateral is "within the jurisdiction of this state."⁵⁵ The official comments to the Code interpret this as equivalent to "physically located in this state." This is probably the present Ohio rule,⁵⁶ and if generally adopted by the various states would resolve the problem of complying with the requirements of several states in transactions with contacts in several states. There are several important exceptions in the Code to this general rule. If the property was outside State A and the parties understood at the time the security interest was agreed upon that the property would be kept in State A and it was brought there within thirty days, then the law of State A governs.⁵⁷ Ohio case law is in substantial agreement on this principle though, of course, no specific number of days is provided.⁵⁸

Property brought into the state subject to a security interest under the Code remains subject to the original security interest for four months.⁵⁹ If a local filing is made during the four months, the security interest remains effective and dates from its original perfection outside the state. If the local filing is made after four months or if the security interest was not perfected elsewhere, the security interest dates from the local filing. Ohio law presently recognizes security interests perfected in other states only when the property is brought into Ohio without the knowledge or consent of the lien holder.⁶⁰ The Code provisions are based on the Uniform Condi-

⁵³ See e.g., N. Y. PERS. PROP. LAW § 45.

⁵⁴ See OHIO REV. CODE §§ 1319.17, 1319.18, and 1319.99.

⁵⁵ U.C.C. § 9-102.

⁵⁶ *Boyer v. M. D. Knowlton Co.* 85 Ohio St. 104 (1911).

⁵⁷ U.C.C. § 9-103(3).

⁵⁸ *Boyer v. M. D. Knowlton Co.*, 85 Ohio St. 104 (1911); *E. I. duPont de Nemours Powder Co. v. Jones Bros.*, 200 Fed. 638 (1912); *Potter Mfg. Co. v. Arthur*, 220 Fed. 843 (1915); and *In re Pickett*, 37 Ohio L. Rep. 153 (Fed. 1932).

⁵⁹ U.C.C. § 9-103(3).

⁶⁰ *Universal Credit Co. v. Reising*, 32 Ohio N. P. (N.S.) 486 (*affirmed*, 50 Ohio App. 289) (1935); *Kanoga v. Taylor*, 7 Ohio St. 134 (1858).

tional Sales Act (not adopted in Ohio) which require a conditional seller to file within ten days after he "received notice" that the goods had been removed to another state. By making the period long enough for a reasonably vigilant lien holder to have learned that the goods have been removed from the original state and to have completed a search for them in other states, the Code can use an objective rather than a subjective test. It seems to be a workable one.

The test for the mobile equipment normally used in several states is the "chief place of business" of the debtor.⁶¹ Thus for road building equipment, construction machinery, airplanes and the like it will no longer be necessary for the secured party to file in each filing district where the equipment might be used. The special treatment of some of this equipment under the Ohio conditional sales act reflects the business need of safe financing of such chattels. The Code's rule seems sound, although some might prefer the definite situs of the debtor's place of incorporation rather than the less definite situs of "chief place of business" which the official comments describe as "the place from which in fact the debtor manages the main part of his business operations."

A final point on the conflict of laws rules of the Code is that the permission given by Code § 1-105 (6) for parties to select the controlling law is limited by Code § 1-102 (3) (b) which would not permit the parties to agree upon a controlling law which would adversely affect the interests of third parties. The debtor and secured party cannot, therefore, stipulate that their transaction shall not be governed by Article 9 if that would be a detriment to the rights of anyone who might have expected Article 9 to govern.⁶²

SECURITY INTERESTS IN DOCUMENTS OF TITLE, INSTRUMENTS AND GOODS UNDER THE COMMERCIAL CODE

The Code establishes a single procedure for the creation, attachment, perfection and enforcement of security interests. In some classifications of property a security interest can be created without going through the entire procedure, but the formal requirements are reduced to a bare minimum and, if required at all, they are the same for all property. This will mean that under the Code litigation in Ohio attacking the validity of security interests will turn on new issues. The familiar technical grounds of attack against a claimant seeking to assert a secured position are: He

⁶¹ U.C.C. § 9-103(2).

⁶² See Goodrich, *Conflicts, Niceties, and Commercial Necessities*, 1952 WIS. L. REV. 199 (1952) for general discussion of conflict of laws under the Code.

used the wrong form.⁶³ Even though the objector knew about the filing, claimant filed in the wrong place.⁶⁴ The information filed by claimant was reasonably adequate but not technically complete.⁶⁵ Claimant's sworn statement said the chattel mortgage was "for value received" and "in good faith" but it did not use the statutory wording of "just and unpaid."⁶⁶ His sworn statement was that the mortgage was "just and unpaid" but it did not use the statutory wording for an indemnitor that the mortgage was "taken in good faith."⁶⁷ His affidavit was incomplete and it cannot be aided by statements in the mortgage because the affidavit did not incorporate them by reference.⁶⁸ Claimant did not inscribe his affidavit "thereon" but used a separate sheet attached to the contract of sale.⁶⁹ Claimant did not adequately describe the mortgaged property.⁷⁰

Under the Code, issues such as above listed, all of them technical and many of them trivial, will not arise since under the Code a security interest is created by a simple agreement between the secured party and the debtor⁷¹ and the only formal requirements are:

- (a) It must be in writing unless the collateral is in the possession of the secured party.⁷²
- (b) It must describe the collateral and must also describe the land if the collateral is crops or is oil, gas or min-

⁶³ *Trust & Savings Bank v. Devlin*, 6 F. 2d 518 (1925). (Trust receipt treated as an unfiled chattel mortgage.); *Yurcisin v. Commercial Credit Co.*, 67 Ohio App. 513 (1940). (Chattel mortgage treated as improperly filed conditional sale.); *Bettman-Johnson*, 250 Fed. 657 (1918). (Trust receipt treated as unfiled conditional sale.); *In re Pickett*, 37 Ohio L. Rep. 153 Fed. 1932. (Farm machinery lease with option to purchase at end of term for \$1 treated as unfiled conditional sale.)

⁶⁴ *Houk v. Condon*, 40 Ohio St. 569 (1884). (Judgment creditor may levy and obtain prior lien even though he knew of misfiled chattel mortgage.), but cf. *Toledo Pulp Plaster Co. v. Chambers*, 11 Ohio App. 176 (1919).

⁶⁵ *Osborn Co. v. Wells*, 69 Fed. (2d) 970 (1934). (Name of mortgagor contained name of city but not repeated as location in the chattel mortgage form.)

⁶⁶ *Schuster v. Wendling*, 116 F. 2d 596 (1941).

⁶⁷ *Nesbit v. Worts*, 37 Ohio St. 378 (1881).

⁶⁸ *Blandy v. Benedict*, 42 Ohio St. 295 (1884).

⁶⁹ *National Cash Register Co. v. Closs*, 12 Ohio Cir. Ct. (N.S.) 15 (1908); *Columbus Mdse. Co. v. Kline*, 15 Ohio L. Rep. 525 (1917). (Separate sheet glued to the conditional sales agreement would suffice but not if attached merely by brass fasteners.) Also see *Merchandise Co. v. Kline*, 248 Fed. 296 (1917); *In re Chinese Temple Restaurant Co.*, 54 F.2d 945, 946 (1931). (Affidavit on separate sheet attached by two wire staples does not suffice.)

⁷⁰ *In re Rice*, 18 Ohio N.P. (N.S.) 489 (1914). (A schedule of property covered must be attached to the chattel mortgage and marked as an exhibit. Reference to it is not sufficient.)

⁷¹ U.C.C. § 9-201.

⁷² U.C.C. § 9-203(1) (a).

erals to be extracted from the land. The description is sufficient "whether or not it is specific if it reasonably identifies the thing described."⁷³

(c) It must be signed by the debtor.⁷⁴

The technical requirements of some of the present Ohio chattel lien laws of acknowledgment, accompanying affidavits, etc., are abandoned. Since the evidentiary purposes of (a) clearly establishing the existence of the security interest at a time prior to the debtor's insolvency, and (b) identifying the property covered are met by the secured party's possession of the collateral or by his filing of the written agreement, the Code's simplified form meets the real needs of a public-notice-prior-to-insolvency system.

As is true under present Ohio law, under the Code the security agreement is effective according to its terms between the parties despite formal defects and despite failure to file.⁷⁵ Likewise both Ohio law and the Code permit the unfiled chattel security interest to prevail over general creditors who have not obtained a lien on the collateral.⁷⁶ In bankruptcy, however, in the contest between the trustee and the holder of an unfiled chattel security interest the trustee will prevail under present Ohio law or under the Code even though he represents general creditors, because the Bankruptcy Act gives him the status of a lien creditor.⁷⁷ A security agreement is, of course, subject to laws and regulations governing usury, small loans, retail installment sales or the like.⁷⁸

As against persons not parties to the security agreement such as purchasers of the collateral and creditors, the rules established by the Code are somewhat complicated. They are no more complicated, however, than the thicket of present Ohio statutes and case law, and, when analyzed, the rules of the Code form a coherent pattern, which cannot be said of the present Ohio law. There are four technical terms used in the Code which must be understood as a preliminary to working out the pattern of the Code. These are the words "create," "attach," "perfect" and "enforce."

A security interest is "created" by a simple agreement be-

⁷³ U.C.C. §§ 9-110 and -203.

⁷⁴ U.C.C. § 9-203.

⁷⁵ U.C.C. § 9-201, *York Mfg. Co. v. Cassell*, 201 U.S. 344 (1906) (as between the parties to a conditional sale, filing for record is not necessary); *Doyle v. Yoho Hooker Youngstown Co.*, 130 Ohio St. 400 (1936); *Foerstner v. Citizens Sav. etc., Co.*, 186 Fed. 1 (1911) (unfiled chattel mortgage is good as between the mortgagor and mortgagee).

⁷⁶ *Wilson v. Leslie*, 20 Ohio 161 (1852) (unfiled chattel mortgage); *Second National Bank of Hamilton v. Ohio Contract Purchase Co.*, 28 Ohio App. 93 (1927) (unfiled conditional sale); U.C.C. § 9-301(1).

⁷⁷ 11 U.S.C. § 96(a) (2).

⁷⁸ U.C.C. § 9-201.

tween the parties, as described above. It "attaches" to the collateral:⁷⁹

- (a) when an agreement has been made that it is to attach,
- (b) value has been given, and
- (c) the debtor has rights in the collateral.

This security interest, having attached to the collateral, is "perfected," depending upon the nature of the collateral, by possession, by filing, or without either filing or possession. Finally, it is "enforced" by various stated procedures.

Let us return to the subject of the attachment of a security interest. The Code⁸⁰ provides that a security interest which has attached but which has not been perfected will prevail over a lien creditor who knew of the existence of the unperfected security interest. In short, an unperfected security interest is not absolutely void as to all lien creditors. The Ohio chattel mortgage rule is contrary,⁸¹ as is the Ohio conditional sale rule.⁸² The Code, in short, substitutes a subjective test regarding the claimant's knowledge of the prior unperfected lien for the objective test of the present Ohio law, namely which claimant filed first. The same difference exists between the Code's test of priority between successive assignees of an account receivable and the test of the present Ohio law. We have previously expressed our conclusion in discussing that statute that "the more strict (present Ohio) rule would avoid difficult questions to litigate relating to subjective knowledge, but it might occasionally produce quite inequitable results. The reasons for choosing either policy seem less weighty than the desirability of tampering as little as possible with the substantive sections of the Code."⁸³ It should also be noted that the Code regards an individual creditor as a lien creditor from the time of issuance of process which results in attachment or levy within a reasonable time thereafter.⁸⁴ But Ohio regards an individual as a general creditor until the personal property is seized in execution.⁸⁵

Code § 9-204(6) provides a security interest for a buyer who advances funds to his seller to enable the seller to obtain or manufacture the goods ordered. This security interest, which attaches

⁷⁹ U.C.C. § 9-204(1).

⁸⁰ U.C.C. § 9-301.

⁸¹ *Houk v. Condon*, 40 Ohio St. 569 (1884); *The Huber Mfg. Co. v. Seveny*, 57 Ohio St. 169 (1897); *Capital Finance Co. v. Karp*, 75 Ohio App. 210 (1945).

⁸² *Hamilton v. David C. Beggs Co.*, 179 Fed. 949 (1910); *Doyle v. Yoho Hooker Youngstown Co.*, 130 Ohio St. 400 (1936).

⁸³ 14 OHIO ST. L. J. 83 (1953).

⁸⁴ U.C.C. § 9-301(3).

⁸⁵ OHIO REV. CODE § 2329.03. See *Dutt v. Marion Air Conditioning Sales, Inc.*, 159 Ohio St. 290, 296 (1953) for validity in Ohio of a statutory lien on personal property which does not require distraint or seizure of or a levy on particular property in order to perfect the lien.

to the goods by virtue of the contract of sale as soon as the goods become identified to the contract, can be perfected by the buyer and will then protect him in the event of his seller's insolvency. As the practice of "enabling advances" has become more common (particularly in connection with military subcontracting), some such protection of buyers has become necessary, and it is not provided by the Uniform Sales Act.⁸⁶

Code § 9-204 also provides generally that a security agreement may provide that (a) future advances will be secured by the collateral, and (b) after-acquired collateral will secure advances made at any time under the security agreement. There are two limitations on the after-acquired property provision. A security interest will not attach to crops which grow more than a certain number of years (to be determined by the legislature) after the date of the security agreement, except where the security interest is to secure a lease or land contract, in which event the future crops throughout the term of the lease or land contract may be pledged.⁸⁷ This should be compared with the lien now permitted by OHIO REV. CODE § 1319.09 on crops to be planted in one year. The second limitation is that a security interest will not attach to after-acquired consumer goods unless the debtor acquires them within ten days after the secured party gives value.⁸⁸ This protects the consumer field from the use of retail credit sales agreements which would gobble up as security for the first debt all subsequent consumer goods purchased by the debtor, but it permits the commercial field to use the after-acquired property clause to control a borrower from over-buying and over-borrowing.

The status of future advance and after-acquired property clauses under present Ohio law depends upon the security device used. Ohio chattel mortgages will not provide a valid lien on after-acquired property,⁸⁹ and because the affidavit must state the amount of the claim, Ohio chattel mortgages are not adaptable to secure future advances.⁹⁰ Under the factor's lien statute,⁹¹ the railroad equipment statute,⁹² and by the device of field warehousing, a procedure can be developed, however, which gives the same effect as a validation of such clauses.⁹³ The Code therefore would not make

⁸⁶ OHIO REV. CODE § 1315.20(D) (1). See, e.g., *Ely & Walker Dry Goods Co. v. Adams Mfg. Co., Inc.*, 105 F. 2d 906 (2nd Cir. 1939) and cf., OHIO REV. CODE § 1315.76.

⁸⁷ U.C.C. § 9-204(4) (a).

⁸⁸ U.C.C. § 9-204(4) (b).

⁸⁹ *Chapman v. Weimer*, 4 Ohio St. 481 (1855); *Francisco v. Ryan*, 54 Ohio St. 307 (1896).

⁹⁰ *Hurlburt v. Bates*, 90 Ohio St. 430 (1914).

⁹¹ OHIO REV. CODE § 1311.60.

⁹² OHIO REV. CODE § 1701.82.

⁹³ See 14 Ohio St. L.J. 72 ff. and 85 ff. (1953).

possible security arrangements now barred in Ohio. It would merely extend the results now achieved at some trouble and expense by factor's liens or field warehousing to the general commercial financing exclusive of retail consumer credit financing. We have previously pointed out on this point⁹⁴ that retention of old law as a resistance to the expansion of current asset financing does not really block the expansion. It merely makes such financing complex and expensive.

We turn now to the perfection of security interests which have attached to documents of title, instruments or goods. The general rule is that a security interest is perfected by the filing of the security agreement (if it is signed by the secured party as well as the debtor) or of a financing statement. The latter consists of a paper signed by the secured party and the debtor containing their mailing addresses and indicating the types, or describing the items, of property covered.⁹⁵ This notice is substantially the same as the one Ohio presently requires for the assignment of accounts receivable⁹⁶ or for a factor's lien.⁹⁷ The whole idea of notice filing derives from the 1925 Ohio statute providing for the trust receipt affidavit.⁹⁸ The chattel mortgage or conditional sale with all of its greater detail actually serves only as a notice since the amount due invariably will have changed and further inquiry of the parties will be necessary to learn the current status of the indebtedness.

Our discussion of the various exceptions to the general rule of perfection by filing necessarily will be interlaced with a discussion of the various exceptions to the general rule that a perfected security interest prevails over all third parties. Such a combined discussion cannot be both brief and accurate. The following general comments must therefore be regarded as illustrative of the Code's framework and not as precise. The comments will cover four situations.

(1) *The Unperfected Security Interest.* We have already pointed out the Code's subjective test which subordinates to an unperfected security interest the claim of anyone who actually has knowledge of such interest. The unperfected interest will also prevail over the claims of buyers not in the ordinary course of business, including bulk transferees, who do not obtain delivery of the collateral.⁹⁹ The secured party who has a *purchase money* security interest and who files within ten days after giving value will prevail over a lien creditor who attached or levied during the

⁹⁴ 14 Ohio St. L.J. 73 (1953).

⁹⁵ U.C.C. § 9-402.

⁹⁶ OHIO REV. CODE § 1325.01.

⁹⁷ OHIO REV. CODE § 1311.61.

⁹⁸ Now OHIO REV. CODE § 1319.11.

⁹⁹ U.C.C. § 9-301(1).

ten days, and over a bulk purchaser. This ten-day grace period does not protect against a buyer in due course or a competing secured party who perfects during the ten days.¹⁰⁰ These provisions seem a fair compromise between the time needed for orderly business and the race to the recorder's office.

(2) *The Security Interest Which Becomes Perfected Upon Attachment.* A purchase money security interest in consumer goods becomes perfected without filing as does such an interest in farm equipment having a purchase price not in excess of \$2,500.00.¹⁰¹ (If the consumer goods or farm equipment is part of the realty, then filing is required per Code § 9-313, and if it is a motor vehicle Article 9 does not apply at all.) Such perfected interest is superior to the claims of creditors, pledgees and mortgagees but is subordinate to the claim of a buyer without knowledge of the unfiled security interest who gives value and buys for his own personal, family or household purposes or his own farming operations.¹⁰² This of course, is a substantial change from present Ohio law but not from Ohio practice as to consumer goods. Most Ohio stores do not file consumer purchase money chattel mortgages because the cost and time they save by not filing such liens provide an adequate reserve against loss of a secured position in a consumer bankruptcy. Since under the Code a secured party may file if he wishes on consumer goods or farm equipment costing under \$2,500.00, an occasional purchaser from a consumer who neglects to check the records may lose out to a secured party. The same result would obtain under present Ohio law.

As to instruments and documents, the Code provides that for the first 21 days after the security interest attaches it shall be perfected as against all but holders in due course.¹⁰³ After the 21-day period, the secured party must obtain possession since filing will not perfect a security interest in instruments and documents.¹⁰⁴ Once the secured party has had possession of the instruments or documents he may return such collateral to the debtor and retain his perfected security interest for 21 days against all but holders in due course. This protects the secured party in many legitimate situations where he must leave the debtor temporarily in possession of pledged intangibles. For example, the debtor may require the securities for transfer on the issuer's books, to obtain goods covered by a document, etc. The general pattern of this Code provision is derived from the common law pledge theory of a return for tempor-

¹⁰⁰ U.C.C. § 9-301(2).

¹⁰¹ U.C.C. § 9-302(1).

¹⁰² U.C.C. § 9-307(2).

¹⁰³ U.C.C. § 9-304 and -309.

¹⁰⁴ U.C.C. § 9-303(3).

ary and limited use as carried into some of the trust receipts acts¹⁰⁵ and factor's lien acts.¹⁰⁶ It seems to be a useful provision.

(3) *The Security Interest Which Becomes Perfected By Possession of the Secured Party.* When goods, instruments or documents come into the possession of a secured party as collateral, his security interest in that collateral is perfected without filing from the time he takes possession and remains perfected while the collateral remains in his possession.¹⁰⁷ Possession by a bailee is regarded as possession by the secured party except that for field warehousing arrangements filing is required.¹⁰⁸ No public filing of field warehousing arrangements is required under present Ohio law.

(4) *The Security Interest Which Becomes Perfected by Filing.* Except when perfected by possession of the secured party, filing is the only method of perfecting a security interest in

- (a) consumer goods where the security interest is not a purchase money security interest. Even if it is a purchase money security interest, the claim for an interest in consumer goods must be filed if the goods are part of the realty,¹⁰⁹
- (b) equipment, other than farm equipment, whether or not it is a purchase money security interest. A claim for a security interest in farm equipment must be filed if the purchase price is in excess of \$2,500.00 or if the equipment is part of the realty,¹¹⁰
- (c) farm products, whether or not it is a purchase money security interest,
- (d) inventory, whether or not it is a purchase money security interest.

Such filing leaves the perfected security interest in inventory subordinate to the rights of a buyer in the ordinary course of business.¹¹¹ This is substantially equivalent to the so-called floor plan rule in Ohio "which estops the lienholder or the conditional vendor of a dealer's merchandise to assert his claim against an innocent third party, who is misled by the dealer's appearance of ownership or of authority to sell."¹¹² The Code goes a step beyond this doctrine of estoppel in that it protects the buyer even if he knows of the security interest, as does the Ohio Factor's Lien Act.¹¹³ The

¹⁰⁵ But not into the Ohio act.

¹⁰⁶ OHIO REV. CODE § 1311.60.

¹⁰⁷ U.C.C. § 9-305(1).

¹⁰⁸ U.C.C. § 9-305(2).

¹⁰⁹ U.C.C. § 9-313.

¹¹⁰ U.C.C. §§ 9-313 and 9-302(1) (c).

¹¹¹ U.C.C. § 9-307(1).

¹¹² See Note, *Mortgages—Agency—Sales—Effect of Floor Plan Rule on Completing Chattel Mortgages*, 7 OHIO ST. L. J. 94 (1940).

¹¹³ OHIO REV. CODE § 1311.62.

Code further provides that if the secured party in his filed financing statement has claimed an interest in the proceeds of the sale of the collateral, a buyer in the ordinary course of business takes free of the security interest even if the collateral is equipment.

FIXTURES, ACCESSIONS, COMMINGLING AND PROCESSING

The Ohio rule is that the filing of a conditional sales contract covering chattels does not protect the conditional vendor against a subsequent grantee or mortgagee of real estate to which the chattel has been so attached as to become a fixture.¹¹⁴ The Code provides a fairer and more workable rule.¹¹⁵ If the secured party perfects by filing before the goods are attached to the realty, he is protected against everyone, but if he repossesses, he must pay the cost of repairing any physical damage to the realty caused by removing the attached item and may be required to post security for such cost before proceeding. If the secured party does not perfect by filing until after the goods have been attached to the realty, he is subordinated to any of the following who act without knowledge of the security interest and before it is perfected: subsequent vendees of the realty, subsequent judgment creditors with liens on the realty and prior mortgagees who make subsequent advances.

The logic of the present Ohio rule is that the buyer of real estate has no way of locating liens on fixtures since they will be recorded in the county where the mortgagor or conditional vendee resides and this is not always the county where the real estate is located. The Code meets this problem by providing that a security interest in goods which are or are to be so affixed to realty as to be a part thereof should be filed in the office where a mortgage on the realty concerned would be filed or recorded.¹¹⁶

The Code has rules for accessions similar to the fixture rules¹¹⁷ and also solves some of the intricate commingling and processing problems by providing that the security interest shall continue on a ratable (according to cost) portion of the mingled mass or proc-

¹¹⁴ *Holland Furnace Co. v. Trumbull Sav. Co.*, 135 Ohio St. 48 (1939); *Twentieth Century Heating Co. v. H.O.L.C.*, 56 Ohio App. 188 (1937); *Brennan v. Whitaker*, 15 Ohio St. 446 (1864) (same rule as to chattel mortgages). See Comment—*Fixtures—Recording of Conditional Sale Contract as Notice to Purchasers of Realty*, 6 OHIO ST. L. J. 219 (1940) and Note—*Priority of Lien—Conditional Sale Contract or Chattel Mortgage Over Real Estate Mortgage*, 4 OHIO ST. L. J. 246 (1938).

¹¹⁵ U.C.C. § 9-313.

¹¹⁶ U.C.C. § 9-401(1) (c).

¹¹⁷ U.C.C. § 9-314.

essed product.¹¹⁸ Neither Ohio case law nor Ohio statutes at present deal adequately with these problems.¹¹⁹

ENFORCEMENT

In Ohio the restrictions of OHIO REV. CODE § 1319.14 requiring the conditional vendor to refund or tender prior to repossession the money paid minus reasonable compensation for use have pretty much discouraged use of the conditional sale. On the other hand, the provisions of OHIO REV. CODE § 1319.07, covering rights of the chattel mortgagee upon default, set up a procedure which does not facilitate the maximum net realization on disposal of the collateral. In the first place, the mortgagee is encouraged to foreclose in a court of record so that he can preserve his right to a deficiency judgment.¹²⁰ His alternative is to give a 10-day advance notice of the sale and to sell only by bid and at a price not less than a minimum stated in his notice. (One case permits the mortgagee to send the notice to mortgagor at the address given in the notice even though he knows mortgagor has moved.)¹²¹ The Crop Mortgage Act, Railway Equipment Act, Factor's Lien Act, and Trust Receipts Act have no comprehensive default provisions.

The Code eliminates all the technicalities of the Chattel Mortgage and the Conditional Sales Acts and provides a series of cumulative remedies¹²² for the secured party which are aimed at encouraging a business-like disposal of the collateral at a maximum net return without permitting overreaching by the secured party. The rights of the debtor and the duties of the secured party may be waived or varied only as specifically provided.¹²³ The secured party may always reduce his claim to judgment.¹²⁴ He may sell or collect on instruments¹²⁵ and may sell either the documents or the goods covered by them.¹²⁶ If the collateral is goods, he may accept them in discharge of the obligation or may judicially foreclose or may repossess and sell after preparation for sale and may recover any deficiency.¹²⁷ But when the collateral is in his possession,

¹¹⁸ U.C.C. § 9-315.

¹¹⁹ See Evans, *Some Applications of Title by Accession*, 16 U. OF CIN. L. REV. 267 (1942); Cameron, *Factors' Liens in Ohio*, 23 OHIO BAR 361, 364 (1950); and Note—*Chattel Mortgages—Conditional Sales—Accession*, 18 Ohio Op. 496 (1940).

¹²⁰ See *Restrictions on Deficiency Judgment Where Chattel Mortgagee Repossesses Property Without Order of Court*, 10 OHIO ST. L. J. 470 (1949).

¹²¹ *Midland Discount Co. v. White*, 49 Ohio Op. 143 (1952).

¹²² U.C.C. §§ 9-501(1) and (3).

¹²³ U.C.C. § 9-501(3).

¹²⁴ U.C.C. § 9-501(1).

¹²⁵ U.C.C. § 9-501(1).

¹²⁶ U.C.C. § 9-501(1).

¹²⁷ U.C.C. § 9-501(1).

the secured party must take due care to protect it.¹²⁸ The debtor has a carefully defined right of redemption¹²⁹ and he also has a right to require the secured party to dispose of the collateral in accordance with Article 9.¹³⁰

Peaceable repossession is allowed¹³¹ and the secured party is also permitted to leave equipment temporarily on the debtor's premises after rendering it unusable and to sell it from that location.¹³²

The secured party is given considerable discretion as to preparation of the collateral for sale and the manner of the sale provided he gives reasonable notice to the debtor (but such notice is unnecessary if the collateral is perishable or threatens to decline rapidly in value or is of a type customarily sold on a recognized market) and provided "every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable."¹³³ "Commercially reasonable" is defined with some care.¹³⁴

To protect consumers, the holder of a purchase money security interest must sell the collateral in 90 days after repossession if the debtor has paid 60% of the cash price. Otherwise the consumer can sue for conversion or for a return of the "finance charge" plus 10% of the purchase price. If the secured party does sell, the consumer is liable for any deficiency. Per Code § 9-505(1) the consumer may renounce his right to insist on a resale, and might well do so in consideration of being freed from a deficiency liability. If the consumer has paid less than 60% of the purchase price, the secured party may propose to keep the collateral as satisfaction of the debt. If no objection is made in 30 days, the proposal is deemed accepted.¹³⁵

CONCLUSION

In the earlier paper on Article 9 we have discussed the priority of conflicting security interests¹³⁶ and the filing provisions.¹³⁷ We made some suggestions as to changes in the filing provisions which are equally applicable to the security interests discussed in the present paper. Our general conclusion in the earlier paper as to

¹²⁸ *cf.*, U.C.C. § 9-207.

¹²⁹ U.C.C. § 9-506.

¹³⁰ U.C.C. § 9-501(2).

¹³¹ U.C.C. § 9-503.

¹³² U.C.C. § 9-503.

¹³³ U.C.C. § 9-504(2).

¹³⁴ U.C.C. § 9-507(2).

¹³⁵ U.C.C. § 9-505(2).

¹³⁶ 14 Ohio St. L.J. 85 (1953).

¹³⁷ 14 Ohio St. L.J. 78 (1953).

security interests in accounts, contract rights and chattel paper was that the Code is preferable to the existing Ohio law because (a) the Code integrates its provisions for security interests in goods into its provision for security interests in other property, particularly accounts receivable arising from the sale of the goods used as collateral, and (b) the Code has been adopted by Pennsylvania and will be adopted by many other states. (In 1953 the Code was introduced into the state legislatures of California, Connecticut, Illinois, Indiana, Massachusetts, Mississippi, New Hampshire, and Pennsylvania. Only Pennsylvania has taken final action. In 1952 an incompleated version of the Code was introduced into the New York legislature for educational purposes. The New York Law Revision Commission is considering the Code and is expected to report by August, 1954.)

There are more urgent reasons for replacing the present Ohio law relating to security interests in documents of title, instruments and goods. In 1951 Ohio thoroughly revised its statute as to contract rights and accounts receivable, and, indeed, brought the Ohio law into substantial conformity with what is proposed by the Uniform Commercial Code.¹³⁸ The hodge-podge of laws relating to security interests in documents of title, instruments and goods was improved in language and organization by the Revised Code of 1953, but no attempt was made to eliminate technicalities, to integrate the various statutes or to modernize them.

We have discussed ten antiquated security devices with which Ohio lawyers and business men now struggle. Of these the trust receipt and the conditional sale are practically never used. The crop mortgage and the railroad equipment mortgage have been especially drafted for particular needs. The consignment and bailment lease have an uncertain legal status. The field warehouse and the chattel mortgage require very technical compliance or the security interest will be lost. The common law pledge lacks adequate provision for temporary possession by the pledgor. The factor's lien statute is not integrated with the assignment of accounts receivable provisions.¹³⁹ In short, the statutes and decisions which comprise the Ohio law in this field are an inadequate and complicated framework which can probably be put into a reasonably workable pattern only by starting off with an entirely fresh approach.

Article 9 offers such a fresh structure. No other part of the Code has been so extensively analyzed by legal scholars, checked by counsel dealing in a practical way with the subject, and debated section by section by the various competing commercial

¹³⁸ See history at 14 Ohio St. L.J. 75 (1953).

¹³⁹ See, e.g., WIS. STAT. § 241.145(a).

interests until reasonable compromises of conflicting views have been developed. The ten antique personal property liens now available in Ohio cannot properly serve modern commercial needs. They should be replaced with a modern statute. Revised at meeting after meeting of the American Law Institute and of the Commissioners on Uniform State Laws, Article 9 provides Ohio the opportunity to obtain a modernized legal framework in this field. The authors strongly recommend that this Article of the Code be adopted in Ohio.